

IP 05-0043-CR 5 B/F USA v Bermudez  
Judge Sarah Evans Barker

Signed on 06/30/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

USA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
AMARAL-ESTRADA, JOSE ALFREDO,	)	CAUSE NO. IP05-0043-CR-05-B/F
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
vs.	)	IP 05-43-CR- -B/F
	)	
JUAN CARLOS BERMUDEZ, et al.,	)	
(JOSE ALFREDO AMARAL-ESTRADA and	)	-05
EVARARDO LIRA-ESQUIVEL),	)	-13
Defendants.	)	

ENTRY DENYING DEFENDANT LIRA-ESQUIVEL'S  
MOTION TO QUASH ARREST AND SUPPRESS EVIDENCE AND  
DEFENDANT AMARAL-ESTRADA'S MOTION TO SUPPRESS EVIDENCE

Before the Court are the motions of two of the Defendants in this five count indictment which alleges various violations of federal drug statutes: Defendant Evarardo Lira-Esquivel's ("Lira-Esquivel") Motion to Quash Arrest and Suppress Evidence and Jose Alfredo Amaral-Estrada's ("Amaral-Estrada") Motion to Suppress Evidence alleging a Fourth Amendment violation, and brought pursuant to Rules 2 and 12(b)(3) of the Federal Rules of Criminal Procedure. The events giving rise to this prosecution and the Defendants' alleged violations of law occurred on May 9, 2005; specifically, Lira-Esquivel seeks to quash his May 9, 2005, arrest and to suppress any and all evidence collected that day resulting from the government's use of "cellular site information" which technology, through a process of triangulation, identified the precise location of a cell phone traced to and believed to be owned by another co-conspirator at Lira-Esquivel's apartment building, as well as all evidence obtained from the subsequent entry by police into and search of his apartment. Amaral-Estrada seeks to suppress any and all evidence obtained as a result of his stop, detention and arrest by the police, also on May 9, 2005,

at or near the intersection of Long and Schubert Streets, in Chicago, Illinois, and the subsequent non-consensual search of the vehicle in his possession at the time of his arrest.

Each Defendant filed a motion and memorandum in support and the government filed its Combined Response, in answer to which the Defendants filed Reply Briefs. An evidentiary hearing was conducted in three stints – on, April 12, 17, and 27, 2006.<sup>1</sup> At the conclusion of the hearing, Defendants filed a Joint Supplemental Memorandum<sup>2</sup> and the Government filed another Combined Response. Having reviewed the parties’ briefings and the evidence adduced at the hearing, we now DENY both Defendant Lira-Esquivel’s Motion to Quash Arrest and Suppress Evidence as well as Amaral-Estrada’s Motion to Suppress Evidence.

#### Factual Background

On May 9, 2005, agents of the Drug Enforcement Agency (“DEA”) were conducting surveillance in the vicinity of 5352 W. Deming Pl., in Chicago, IL (“5352 Deming”) in search of

---

<sup>1</sup> At the hearing, the government presented testimony of two DEA Special Agents, Gerald Dooley and Chris O’Reilly, as well as, the testimony of Mario Elias, a Spanish speaking Chicago drug task force officer. Amaral-Estrada testified on his own behalf. Lira-Esquivel presented the testimony of his wife, and the affidavit of a federally certified Spanish language court interpreter concerning the translation of the consent to search form which he and his wife had signed, as well as photographs of the apartment in which they were both arrested. The parties entered into a stipulation, under seal, regarding the use of certain electronic equipment by a U.S. Marshal in locating the purported cell phone of the target of the arrest warrant, Defendant Sosa-Verdeja.

<sup>2</sup> This Joint Supplemental Memorandum augments Defendant Lira-Esquivel’s Supplement to His Motion to Quash Arrest and Suppress Evidence Regarding Cellular Telephone Evidence. Lira-Esquivel’s Supplement was filed on April 19, 2006, during the course of the evidentiary hearing.

Freddy Adan Sosa-Verdeja (“Sosa-Verdeja”)<sup>3</sup> who was at that time a fugitive. An arrest warrant had been issued for Sosa-Verdeja based on a March 23, 2005 indictment. (Gov. Exh. 2.) According to the testimony of DEA Special Agent Gerald Dooley (“SA Dooley”), U.S. Deputy Marshal Steve Processor, by using an electronic device and the cellular site information<sup>4</sup> obtained based on a court order signed by Magistrate Judge Foster,<sup>5</sup> was able to pinpoint the

---

<sup>3</sup> The indictment in this case spells Sosa-Verdeja’s first name “Freddy” while the magistrate judge’s May 3, 2005 Order spells it “Fredy.” We are not certain which spelling is accurate.

<sup>4</sup> Certain of the law enforcement officers believed, based on the tracking device data, that the phone was located in one of the three apartments at 5253 Deming Pl., Chicago, Illinois. However, other officers speculated that the cellular phone might actually be in a neighboring building, at 5348 Deming Pl. Tr. at 52-54.

<sup>5</sup> On May 3, 2005, Magistrate Judge Foster issued an order under seal pursuant to 18 U.S.C. § 3123(d). The application for the Order was brought before the court by an assistant U.S. attorney pursuant to 18 U.S.C. §§ 2703 and 3122. The application requested an Order under 18 U.S.C. §§ 3123 and 3124 to authorize the application and use of a pen register and trap and trace device and to determine certain telephone information for the cellular telephone using telephone number (773) 289-2234, and utilizing IMSI 310260002257839 (“Target Phone”), with service provided by T-Mobile (“Service Provider”).

The May 3, 2005 Order states: “Pursuant to 18 U.S.C. §§ 2703(c)(1)(B)(ii) and (d), the Court finds that the applicant has certified that the information likely to be obtained is relevant to an ongoing criminal investigation of Fredy Sosa-Verdeja, and others yet unknown, in connection with possible violations of, among others, [18 U.S.C. § 1073 and 21 U.S.C. § 841].”

“It appearing that the information likely to be obtained by a pen register and trap and trace device applied and used on Target Phone, and the information obtained pursuant to 18 U.S.C. § 2703(c)(1)(B)(ii), is relevant to an ongoing criminal investigation of the specified offenses and that the government has offered specific and articulable facts showing that there are reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation . . . .” the United States Marshals Service (USMS) and DEA are permitted: 1) pursuant to 18 U.S.C. § 3123(b), to apply and use a pen register and trap and trace devices on the target phone to receive and  
(continued...)

multi-unit residence located at 5352 West Deming Place as the precise location of a particular cell phone believed to be used by or otherwise connected with Sosa-Verdeja. (Tr. at 17, 19; Gov. Exh. 3.) Unbeknownst to law enforcement prior to May 9, 2005, but ascertained thereafter through evidence adduced at the hearing, Sosa-Verdeja had rented the apartment and garage at 5352 Deming and had stored his possessions in that apartment. (Gov't Exh. 9 and Tr. 161- 64.)

The police officers and federal agents surveilling the vicinity of 5253 Deming had been provided a wallet-sized photo of Sosa-Verdeja to assist in making the identification of him.

DEA Special Agent Christopher O'Reilly ("SA O'Reilly")<sup>6</sup> was informed by another law

---

<sup>5</sup>(...continued)

register outgoing numbers, incoming call telephone numbers, and date time and duration of all call activities associated with target phone for sixty days; 2) pursuant to 18 U.S.C. § 2703(d), to receive cellular site information relating to target phone for 60 days. This "authorization applied not only the telephone number associated with the target phone, but to any telephones or telephone numbers accessed by or through the same IMSI number utilized by the target phone, and to any IMSI number subsequently assigned to the instrument bearing the telephone number currently assigned to target phone within the sixty day period."

The Order also required service providers to furnish the USMS and DEA all information, facilities and technical assistance necessary to accomplish the application and use of the pen register and trap and trace device and receipt of the cellular site information unobtrusively, as to minimize any interference with the services that are accorded the person to whom the application and use is to take place. 18 U.S.C. § 3124. Service Providers were also required to furnish the USMS and DEA with subscriber information and call detail records for the target phone and both published and non-published telephone numbers communicating with target phone. 18 U.S.C. §2703(d). Finally USMS and DEA were ordered to compensate service providers and any other communications-related carrier providing information, facilities, and technical assistance for expenses reasonably incurred in complying with this Order, except for providing records or other information maintained by the communications carriers that relate to telephone toll records and telephone listings pursuant to 18 U.S.C. § 2706(c).

<sup>6</sup> Over the course of his career, SA O'Reilly testified, he had observed approximately twenty drug drops. (Tr. 138.)

enforcement officer that a vehicle had been spotted pulling into the alley north of Deming Place from Long Street which appeared to be driven by Sosa-Verdeja; (the driver was later identified as Defendant Amaral-Estrada). (Tr. at 141.) SA O'Reilly knew from his investigation that Sosa-Verdeja and the drug organization he was connected with transported their cocaine in cars. (Tr. 140-41.) SA O'Reilly observed the driver in a Chrysler M300 with a passenger in the front seat, who was later identified as Cutberto Solano-Cabrera ("Solano-Cabrera"). Gov't Resp. at 5. SA O'Reilly followed the car driven by Amaral-Estrada and occupied by Solano-Cabrera as it pulled out of the alley onto Lockwood Street and continued moving for about a half-block before turning west on Drummond where it was parked at mid-block. (Tr. at 143.) Agent O'Reilly observed Amaral-Estrada and Solano-Cabrera exit the vehicle, look around the area, as if to see if they were being watched or followed, and then proceeded to walk back around the block in the direction they had just come in the car. (Tr. at 145-46.) The agents observed these actions and the retracing of their route which they regarded suspicious behavior and noted other suspicious behaviors as they walked, such as their frequent glances back over their shoulders. (Gov'n't Resp. at 5; Tr. at 145.) SA O'Reilly followed the two men in his car for approximately fifteen minutes at which point he parked his vehicle near the corner of Long and Shubert Streets, got out and identified himself as a police officer and requested that the two men present identification. (Tr. at 146.) Two other agents, SA Sam Ginelli and SA Robert Bella, pulled up to the scene at that the same time, stopped their car, got out and also approached the Defendants. Solano-Cabrera began to back away from the officers as they approached, prompting SA O'Reilly who believed that Solano-Cabrera was going to attempt to flee to take hold of the back of his arm and escort him over to the front of his police car, where both Amaral-Estrada and Solano-Cabrera

were instructed to stand. (Tr. at 147.) At that moment, SA O'Reilly believed Amaral-Estrada might be the fugitive Sosa-Verdeja, whom they had been seeking. (Tr. at 152.)

Amaral-Estrada was detained in order to allow SA O'Reilly to conduct a pat down search of his person, as a result of which SA O'Reilly removed all of the items from Amaral-Estrada's pockets, including cell phones and keys.<sup>7</sup> (Tr. at 148.) SA O'Reilly inspected Amaral-Estrada's Mexican driver's license and voter registration card, both of which contained the name of Amaral-Estrada, not Sosa-Verdeja. (Tr. at 148.) During the search, SA O'Reilly retrieved a set of Chrysler car keys from Amaral-Estrada's pocket. Amaral-Estrada testified that he does not speak or understand English, which fact he made known to the agents at the scene. (Tr. at 262.) A Spanish-speaking DEA Task Force Officer, Mario Elias ("TFO Elias"), therefore, was contacted by the officers via a two-way Nextel radio so that TFO Elias could translate into Spanish SA O'Reilly's questions to Amaral-Estrada and Amaral-Estrada's answers into English. (Tr. at 150). According to SA O'Reilly and TFO Elias, Amaral-Estrada was asked where they were coming from to which he replied that they were walking around, and that they came from Bensonville, Illinois. They could not answer how they got into the City of Chicago from Bensonville. (Tr. at 150-51.) In the course of these questions and answers, Amaral-Estrada denied any knowledge of the Chrysler M300. (Tr. at 151).

However, at the evidentiary hearing, Amaral-Estrada testified that he had never denied driving or being in the car, but stated simply that he didn't own the car. Further, Amaral-Estrada testified that he had told SA O'Reilly, as translated by TFO Elias, that he had driven the car into

---

<sup>7</sup> Amaral-Estrada points out that the agents did not examine the cell phones they recovered at the scene to determine if any of them was the target cell phone, or if any of them had called the target cell phone.

Chicago and that he was in the neighborhood to locate an apartment to rent. At the hearing, Amaral-Estrada explained that he had been driving the Chrysler M300 for approximately a week prior to his arrest, as it had been left for his use by Sosa-Verdeja. (Tr. at 265.) Amaral-Estrada said that he had been told to drive the car to a designated Walgreen's Drug Store and go inside, and while in the store, something would be left in the car. Amaral-Estrada followed these instructions: he parked the car outside the specific Walgreen's, exited the car and entered the store; when he returned, he saw for the first time a black duffel bag on the back seat of the car. (Tr. 286-292.) Amaral-Estrada testified that he did not care about the bag in the back seat because it was not his bag and not his car. (Tr. 288-290.)

Believing Amaral-Estrada had denied any connection with or knowledge of the car in which he and Solano-Cabera had been seen immediately prior by the officers, SA O'Reilly detained both men for lying about the vehicle; he also still believed that Amaral-Estrada was actually or was likely to be Sosa-Verdeja. (Tr. at 151-52.) Amaral-Estrada was placed in the rear seat of SA O'Reilly's police car and transported to the parked Chrysler M300. Upon arrival there, SA O'Reilly surveyed the vehicle for about 30 to 40 minutes<sup>8</sup> and then approached the outside of the vehicle, and, by looking inside through the car window, spotted a large black duffel bag lying in the middle of the back seat. Again utilizing the two-way radio hook up with TFO Elias, Amaral-Estrada was asked about the bag and in response denied that the bag was his and further denied that he had ever been inside the vehicle. SA O'Reilly, using the keys recovered earlier from Amaral-Estrada's pocket, unlocked the Chrysler M300 car door using the

---

<sup>8</sup> The officers surveyed the vehicle for this period of time because they believed that someone from the drug-trafficking organization was going to come by and either pick up the vehicle or take something out of the vehicle. (Tr. at 153.)

remote entry device. (Tr. 154-56.) At the hearing, however, Amaral-Estrada testified that he could not understand everything he was being asked, in part because the two-way radio transmitting the translations kept cutting out. (Tr. at 273.)

SA O'Reilly testified that, upon seeing the duffle bag, he believed it was part of a "drug drop," though admitting that nothing about the exterior of the bag itself indicated that it was filled with contraband. SA O'Reilly accordingly proceeded to search the vehicle without the consent of the defendant because Amaral-Estrada had denied any connection to the car; that search was conducted without a search warrant. SA O'Reilly opened the unlocked car door, (the government admits that the door could have been unlocked when the agent tested the key fob taken from Amaral-Estrada), looked inside the duffle bag on the rear seat, discovered that it contained U.S. currency, removed the bag from the car and eventually took its contents to a bank for counting and thereafter secured the contents and the bag. The cash contained in the bag totaled \$254,947.00. Amaral-Estrada was not "Mirandized" until after this search and after TFO Elias had arrived at the scene to conduct the rights appraisal in Spanish.

With Amaral-Estrada in custody, the agents proceeded to 5352 Deming Place. SA Dooley testified that around 12:45 p.m., he and SA O'Reilly, along with other officers, decided to attempt to do a "knock and talk" or a consent search of the three targeted apartments at the previously pinpointed address. The 5352 Deming location consisted of a two-story building containing one apartment in the basement, one apartment on the first floor and one apartment on the second floor. When the officers arrived, they discovered that the door into the common entrance was open, allowing them to enter the foyer and common staircase without requesting access from any of the building's residents or management. (Tr. at 66-67.) When the

officers knocked on both the basement and first-floor apartment doors, no one answered.

The team of officers proceeded to the second floor apartment where, from outside in the hallway, they could hear a television inside. SA O'Reilly knocked on the door, apparently awakening Maria Leticia Verdeja-Sanchez ("Verdeja-Sanchez")<sup>9</sup> – who is Lira-Esquivel's wife and Sosa-Verdeja's mother – from her nap. The testimony reflected very different accounts by the witnesses regarding the way in which the police entered the apartment. Verdeja-Sanchez testified that she was inside the apartment when she heard pounding on the door and loud voices, which words she couldn't translate, coming from outside her apartment. She said that someone attempted to turn the locked door knob, as though they were trying to enter the apartment, and that, when she unlocked the door, the police pushed it open, held her at gun point, handcuffed her, and threw her to the floor.<sup>10</sup>

The government's version, as recounted through the agents, was that Verdeja-Sanchez opened the door slightly, just wide enough to expose her head and one shoulder to view. SA O'Reilly, who was standing outside the doorway, asked her if she spoke English, to which she replied, "a little."<sup>11</sup> He then asked her if anyone else was inside and she answered "no." SA

---

<sup>9</sup> Ms. Verdeja-Sanchez signed her affidavit with her name spelled "Berdeja-Sanchez." We assume that this was a typographical error because, when she testified at the evidentiary hearing on April 17, 2005, she spelled her name to the court reporter with a "V" and not a "B."

<sup>10</sup> Defense counsel's filings with the Court recited the facts slightly differently: that when Verdeja-Sanchez cracked the door open, it was pushed the rest of the way open so hard that it knocked her to the floor. At the hearing, Verdeja-Sanchez testified that she was not pushed by the door, but that, after the officers entered, she was handcuffed and thrown to the floor.

<sup>11</sup> Verdeja-Sanchez testified, however, that in fact she does not speak or  
(continued...)

O'Reilly then asked Verdeja-Sanchez if she knew Sosa-Verdeja, displaying to her the wallet-sized photo of Sosa-Verdeja, which he had carried with him for that purpose. She again answered "no," but, as she leaned forward to view the photo more closely, the officers were given a broader view into the apartment which brought into view the arm of another person sitting further into the apartment.<sup>12</sup> At that point, SA O'Reilly pushed open the door, entered the apartment, approached the man seated on the couch whose arm he had seen and asked him to present identification. That man turned out to be the Defendant, Lira-Esquivel. At the same

---

<sup>11</sup>(...continued)

understand English, having been in the United States only six months at the time of her arrest. (Tr. at 235.) Verdeja-Sanchez further testified that she lived, worked, and shopped in places in Chicago that did not require her to know or speak English. (Tr. at 243-47.) The agents did not attempt to speak with her in English upon entering the apartment. Lira-Esquivel maintains that his wife did not lie to the officers in response to their questions; she simply could not answer their questions based on her inability to understand English. (Def.s' Joint Supp. at 5.) Verdeja-Sanchez testified, however, that it was not that she did not understand SA O'Reilly's questions, rather that law enforcement officers forcibly entered the apartment without asking her any questions. (Gov't Combined Response at 12.)

<sup>12</sup> The government contends that Verdeja-Sanchez told SA O'Reilly that no one else was in the apartment, which was contrary to what SA O'Reilly saw in catching sight of the arm of another person on the couch, and thus he was justified in investigating the situation further by pushing the door farther open. (Tr. at 78.) Lira-Esquivel contends that the testimony of SA Dooley and SA O'Reilly was false because they could not have seen Lira-Esquivel's arm on the couch from their position in the hallway. Def.s' Joint Supp. at 4. SA Dooley testified that he did, in fact, observe Lira-Esquivel's arm at the location where Lira-Esquivel was sitting immediately to the right of the fireplace, but Lira-Esquivel asserts that since his wife had opened the front door only far enough for her head and shoulder to be visible, it would have been impossible to observe his arm in the location which SA Dooley claims. (Def.s' Joint Supp. at 4; citing Tr. at 67-68; Def. Exh. 5.) We conclude that, through the open door, SA Dooley's and SA O'Reilly's view would likely have permitted them to see Lira-Esquivel's arm as he sat on the couch and credit the agents' testimony accordingly. Neither Lira-Esquivel nor Verdeja-Sanchez can dispute the agents' testimony because they were inside the apartment and thus not positioned in a vantage point to know what the agents were able to see from the doorway. See Gov't Combined Resp. at 11.

time as SA O'Reilly pushed open the door and entered the apartment, SA Dooley, utilizing a cell phone he had with him, dialed the targeted cell phone number, which they had previously traced to the fugitive Sosa-Verdeja whom they were attempting to find, causing a cell phone located on the coffee table just inside the apartment to activate.<sup>13</sup> (Tr. at 73.) When the phone activated, the officers reasonably concluded that they had found the place where Sosa-Verdeja was likely to be or had recently been. The officers entered the apartment and detained Lira-Esquivel and Verdeja-Sanchez so that they could conduct a sweep of the apartment to determine if any other people might be there, specifically Sosa-Verdeja, but the search revealed that he was not there.<sup>14</sup> SA O'Reilly directed another officer to examine the couch area where Lira-Esquivel had been sitting, which search produced a loaded nine millimeter handgun tucked into and secreted in the cushions. It is undisputed that, when the agents entered the home of 5352 Deming, they did so without a search warrant.

Lira-Esquivel and his wife were required to remain in the apartment and seated at the dining room table while the officers waited for a Spanish-speaking translator to arrive. There is conflicting testimony regarding whether they were hand-cuffed during this time. SA Dooley testified that he detained them in order to get information from them about Sosa-Verdeja, the couple's immigration status, and the handgun the agents had found tucked in the couch. Agent

---

<sup>13</sup> TFO Dooley testified that he recalled only that SA O'Reilly was in the apartment before he called the target number, while SA O'Reilly testified that both he and SA Ginelli were already in the apartment when TFO Dooley called the target number. (Tr. 4-12-06, p.63, 4-17-06, p.76.)

<sup>14</sup> SA Dooley was aware, through his execution of search warrants in conjunction with his investigation, that two of Sosa-Verdeja's associates had been found to carry firearms. (Tr. 13, 24.)

Dooley's suspicions were aroused by what he believed was false information provided by Verdeja-Sanchez at their doorway encounter, including lies about there being no one else in the apartment and about her not knowing Sosa-Verdeja.

TFO Elias arrived at the apartment approximately twenty minutes after the other agents had entered and, in Spanish, he advised Lira-Esquivel of his Miranda warnings orally and in writing. (Gov't Exh. 4, Tr. at 98-99.) Lira-Esquivel responded that he understood his rights and would speak to the officers. (Tr. 99.) TFO Elias orally requested permission to search the apartment and repeated that request to Lira-Esquivel in writing utilizing the standard consent to search form. Lira-Esquivel inquired whether he was required to agree to the search and TFO Elias advised him in Spanish that he could refuse, in which case the agents could seek a search warrant. Lira-Esquivel then agreed to permit the search and signed the Spanish consent to search form; according to TFO Elias, Lira-Esquivel also verbally agreed to the search. (Gov't Exh. 5; Tr. at 102-103, 123-124, 127.) Verdeja-Sanchez testified that, though she signed the forms, she did not read them at the time because she was scared. The apartment was searched pursuant to the consents given and the officers recovered approximately twelve kilograms of cocaine in a hidden compartment above the pantry area in the kitchen. (Tr. 31.) More than 300 used kilogram wrappings for cocaine were also found in the detached garage. (Tr. 31, 161.) Several notebooks of drug ledgers, as well as, \$20,000 in U.S. currency were also recovered. (Tr. at 31.)

SA O'Reilly interviewed the apartment's landlord, Alejandro Torres, who stated that he rented the apartment and garage to Freddie Adan Sosa-Verdeja. Alejandro Torres was correctly able to identify Sosa-Verdeja as the man in the picture that SA O'Reilly was carrying with him. (Tr. 162-63.)

Verdeja-Sanchez testified at the hearing that Sosa-Verdeja is, indeed, her son and that she last had seen him in December 2004. She stated that the targeted cellular phone located on the table inside the apartment had been given to her by Sosa-Verdeja's wife in September 2004.

Both Lira-Esquivel and Verdeja-Sanchez were taken into custody, but Verdeja-Sanchez was subsequently released. (Tr. at 239.) On July 12, 2005, a five-count Superseding Indictment was filed in the Southern District of Indiana. Defendants Lira-Esquivel and Amaral-Estrada are charged in Count One of the Superseding Indictment with conspiracy to possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

### Legal Analysis

#### **I. Lira-Esquivel's Motion to Quash Arrest and Suppress Evidence**

Defendant Lira-Esquivel's motion to quash his arrest and suppress evidence is based on three primary arguments. The first is that, when law enforcement officers entered his residence on May 9, 2005, without a warrant to arrest him and subsequently to search his apartment, they lacked probable cause and thus acted in violation of his Fourth Amendment rights. Second, Lira-Esquivel contends that law enforcement's use of the electronic device to track the cell phone violated his Fourth Amendment rights because the electronic device intruded into Lira-Esquivel's private dwelling by providing the agents with information they otherwise could not have gained without physically entering the apartment. Finally, Lira-Esquivel asserts that, in using the electronic device to pinpoint the location of the cell phone found within his residence, the law enforcement agents exceeded the statutory authority provided in 18 U.S.C. §§ 2703 &

3122 and that the warrant authorizing the government's use of cell site information was invalid as it was not based on probable cause. We first address below Defendant's claim that the agents exceeded their statutory authority, followed by a discussion of the claim that his Fourth Amendment rights were violated.

**A. Scope of Law Enforcement's Authority to Track a Cellular Phone under 18 U.S.C. §§ 2703 and 3122.**

The government sought and the Magistrate Judge issued an order authorizing receipt of cellular site information for the Target Phone, pursuant to 18 U.S.C. § 2701 et seq. (the Stored Communications Act) and 18 U.S.C. § 3121 et seq. (the pen /trap act). Defendant Lira-Esquivel contends that the warrant exceeded the limitations imposed by those statutes in permitting a cell phone to become a tracking device.<sup>15</sup> Lira-Esquivel also complains that the government's application for the warrant was based only on "specific and articulable facts," rather than probable cause, when probable cause is required to obtain permission to use a tracking device under Rule 41 of the Rule of Criminal Procedure and 18 U.S.C. § 3117, which authorizes a court "to issue a warrant or other order for the installation of a mobile tracking device." See In the Matter of an Application of the United States for an Order (1) Authorizing the Use of a Pen

---

<sup>15</sup> Magistrate Judge Kennard P. Foster's Order of May 3, 2005 ordered "pursuant to 18 U.S.C. § 2703(d), that USMS and DEA may receive cellular site information relating to Target Phone for a sixty day period commencing with the date of this Order." Section 2703(d) states:

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

Register and a Trap and Trace Device, 396 F. Supp. 2d 294 (E.D.N.Y. 2005) (“EDNY Case”) (concluding that the prospective cell site information sought by the government could not be obtained absent a showing of probable cause. Id. at 327). We advance our review of the applicable statutes (Electronic Communications Privacy Act of 1986, the Stored Communications Act (“SCA”), and the Pen / Trap Act) by an explanation of the relevant technology, relying heavily on descriptions set out in other judicial opinions.

When powered on, a cell phone is (among other things) a radio transmitter that automatically announces its presence to a cell tower or “cell site” via a radio signal over a control channel which does not itself carry the human voice. In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747, 751 (S.D. Tex. 2005) [hereinafter Texas Cell Site Case].<sup>16</sup> The phone is constantly seeking the best reception,

---

<sup>16</sup> We are not the first Court to quote heavily from the very helpful opinion handed down by Magistrate Judge Smith. For example, Magistrate Judge Orenstein of the Eastern District of New York wrote in a recent opinion:

To the extent I follow the latter decision's lead, it is not because I view it as controlling, nor even because I am simply deferring to persuasive precedent (although it is assuredly that). Rather, my reliance reflects the fact that I have considered precisely the same statutes and legislative history as Judge Smith (and apparently many of the same arguments), and have independently arrived at the same conclusions as did he. Having done so, it is simply a matter of efficiency to cite or quote from his decision rather than reinvent the wheel.

In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device, 396 F. Supp. 2d 294, 304 (E.D.N.Y., 2005) [hereinafter New York Cell Site Case]. A few months later, Magistrate Judge Bredar wrote, “After independent consideration, this court reached the same conclusion as Judges Smith and Orenstien and will briefly explain its reasoning by borrowing liberally from their extensive opinions.” Maryland Cell Site Case, 402 F. Supp. 2d at 598.

(continued...)

re-scanning for cell sites every seven seconds or when the signal strength weakens, regardless of whether a call is made. In re Application of U.S. for an Order Authorizing Installation and Use of a Pen Register and a Caller Identification System on Telephone Numbers (Sealed), 402 F. Supp. 2d 597, 599 (D. Md. 2005) [hereinafter Maryland Cell Site Case]. “Real time” cell site information refers to data available to and used by the government to identify the location of a phone at a given moment. The use of real time cell site information by law enforcement for tracking purposes is a relatively new law enforcement tool and Congress has yet to provide specific legislative boundaries on the practice. Therefore, we analyze the disclosure of real time cell site information under the existing more generalized statutory scheme. Id.

We begin with a discussion of the Electronic Communications Privacy Act of 1986 (“ECPA”), Pub.L. No. 99-508, 100 Stat. 1848 (1986), though not specifically cited by the Defendants, because it provides the overarching statutory frame work for the cited statutes governing electronic surveillance. The Act consists of three titles: provisions governing tracking devices (Title I),<sup>17</sup> stored electronic information (Title II),<sup>18</sup> and pen register and trap and trace devices (Title III).<sup>19</sup> Real time cell site information, when used to monitor the location and movement of a cell phone and its possessor over time, is governed by Title I’s section on

---

<sup>16</sup>(...continued)

<sup>17</sup> Title I of the ECPA is codified at Title 18 U.S.C. § 2518 et seq. (including mobile tracking device provision at 18 U.S.C. § 3117).

<sup>18</sup> Title II of the ECPA created the Stored Communications Act (“SCA”) (including § 2703).

<sup>19</sup> Title III contains the Pen / Trap Act (including 18 U.S.C. § 3122).

tracking devices. Maryland Cell Site Case, 402 F. Supp. 2d at 603. For the reasons explained below, we conclude that Titles II and III do not cover real time cell site information; following that discussion, we will turn to an analysis of Title I.

1. *Title II of the ECPA: Stored Communications Act*

Title II of the ECPA includes the SCA which deals with access to stored communications and transaction records. Pub.L. No. 99-508, 100 Stat. 1848, 1860 (1986) (codified at 18 U.S.C. § 2701 et seq.). The core provision of that Title is § 2703, which authorizes the government to require disclosure of stored communications and transaction records by third-party service providers. Maryland Cell Site Case, 402 F. Supp. 2d at 600. The SCA defines three categories of information, each with differing access requirements. The first category is “contents of wire or electronic communications in electronic storage.” 18 U.S.C. § 2703(a). The second category is “contents of wire or electronic communications in a remote computing service.” 18 U.S.C. § 2703(b). Disclosure of these two categories of content information generally require either a search warrant under Rule 41, F.R.C.P., or notice to the subscriber or customer. However, “[c]ell site information does not qualify as ‘the contents of a communication’ within the meaning of 18 U.S.C. § 2703(a) and (b) because it conveys data concerning the location of a cell phone and its possessor rather than the contents of any phone conversation.” Maryland Cell Site Case, 402 F. Supp. 2d at 600.

The third category of information identified in the SCA is “subscriber records concerning electronic communication service or remote computing service.” 18 U.S.C. § 2703(c). This third category of information may be obtained by a court order upon proof of “specific and articulable facts showing . . . reasonable grounds to believe that . . . the records or other

information sought, are relevant and material to an ongoing criminal investigation.” 18 U.S.C. § 2703(c); Texas Cell Site Case, 396 F. Supp. 2d at 752.

Section 2703(c) is entitled “Records concerning electronic communication service or remote computing service,” and grants the government access to “a record or other [non-content] information pertaining to a subscriber to or a customer of such service (not including the contents of a communication).” 18 U.S.C. § 2703(c). The SCA does not define the term “record or other information pertaining to a subscriber to or a customer of such service. . . .” See Maryland Cell Site Case, 402 F. Supp. 2d at 600-01. However, real-time cell site information is not a “stored communication” or record and therefore is not covered by § 2703(c).<sup>20</sup> Id. Further, the title of the section itself suggests that cell site information is not included.<sup>21</sup>

---

<sup>20</sup> Structural differences between the SCA and the electronic surveillance statutes suggest Congress did not intend the SCA to cover real time tracking of a cell phone.

Unlike the parts of the ECPA regulating real-time surveillance, the SCA regulates access to records and communications in storage. As such, the SCA imposes no limit on the duration of the government's access, no provision for renewal of the court order, no requirement for periodic reports to the court by the government, and no automatic sealing of court records. In contrast, all of these provisions appear in statutes governing prospective surveillance like wiretap and pen/trap orders. The distinction shows the SCA was not meant to govern this new form of tracking through the use of real time cell site information.

Maryland Cell Site Case, 402 F. Supp. 2d at 602.

<sup>21</sup> While titles are not authoritative of text, Judge Smith explains:

The term “remote computing service” pertains to e-mail and does not implicate cell site information. The term “electronic communication service” is defined elsewhere in the ECPA as

(continued...)

Therefore, the Magistrate Judge's Order of May 3, 2005 which authorized the USMS and the DEA to receive cellular site information relating to Target Phone pursuant to 18 U.S.C. § 2703(d)<sup>22</sup> and "based on specific and articulable facts" did not authorize receipt and use of real time cellular site information under the ECPA.

2. *Title III of the ECPA: Pen/Trap Act*

Title III of the ECPA covers pen registers and trap/trace devices in the Pen/Trap Act.

---

<sup>21</sup>(...continued)

"any service which provides to users thereof the ability to send or receive *wire or electronic communications*." 18 U.S.C. §§ 2510(15), 2711(1) (emphasis added). The acquisition of real time cell site information does not involve the transfer of "wire or electronic communications" as those terms are defined. "Electronic communication" excludes "any communication from a tracking device," 18 U.S.C. § 2510(12)(C). . . . "Wire communication" excludes communication not involving the human voice, and the transmission of cell site information does not involve the transfer of the human voice. 18 U.S.C. §§ 2510(1), (18). In sum, cell site information is not a record concerning electronic communication service or remote computing service and therefore is not covered by Section 2703(c).

Maryland Cell Site Case, 402 F. Supp. 2d at 602; citing Texas Cell Site Case, 396 F. Supp. 2d at 758-61.

<sup>22</sup> Section 2703(d) states:

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.

Pub.L. No. 99-508, 100 Stat. 1848, 1873 (1986) (codified as amended at 18 U.S.C. §§ 3121-27).

A “pen register” records telephone numbers dialed for outgoing calls made from the target phone and a trap/trace device records the telephone numbers of those calling the target phone. “The legal hurdle for pen/trap surveillance is very low: a law enforcement officer need only certify that information likely to be obtained by the pen register or trap and trace device ‘is relevant to an ongoing criminal investigation.’ 18 U.S.C. § 3122(b)(2). Upon that certification, the court must enter an ex parte order.” 18 U.S.C. § 3123(a)(1), (2); Texas Cell Site Case, 396 F. Supp. 2d at 752.

The government’s reliance on the Pen/Trap Act as the basis for Magistrate Judge Foster’s May 3, 2005 Order to justify its effort’s to locate the position of the target cell phone is misguided. Section 103(a)(2) [of the Communications Assistance for Law Enforcement Act of 1994] requires each telecommunications carrier to ensure that the telephone service it provides is capable of being used by authorized law enforcement agents for certain investigative purposes. However, the statute explicitly provides that “with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of title 18, United States Code), such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number).” 47 U.S.C. § 1002(a)(2)(B)); In re Application of the U.S. for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device, 396 F. Supp. 2d 294, 306 (E.D.N.Y., 2005). Thus, by the clear terms of the statute, the Pen/Trap Act (§ 3122) does not authorize real time cell site data collection.

3. *A violation of these statutes does not result in suppression of the evidence because suppression is not an authorized remedy under 18 U.S.C. §§ 2703*

*and 3122.*

The Government argues that, even if 18 U.S.C. §§ 2703 and 3122 forbade the acquisition of cell location information, neither of those statutes requires exclusion of the evidence acquired as a remedy, making the interpretation of those statutes largely irrelevant to our resolution of the Defendant's motion of suppress. Gov't Combined Resp. at 8 (citing United States v. Smith, 155 F.3d 1051, 1056 (9th Cir. 1998) and United States v. Fregoso, 60 F.3d 1314, 1320-21 (8th Cir. 1995)).

We agree that the statutory language in the Pen/Trap Act and the SCA does not mandate exclusion of such evidence as the sanction for violations of those requirements, and in fact, the Stored Communications Act expressly rules out exclusion as a remedy. The Pen/Trap Act provides instead for a criminal penalty that includes a fine or imprisonment, but does not contain any mention of a required exclusion of the evidence. 18 U.S.C. § 3121(d). See e.g., Fregoso, 60 F.3d 1314, 1320 -1321 (8th Cir. 1995) (citing United States v. Thompson, 936 F.2d 1249, 1249-50 (11th Cir.1991) (information obtained from a pen register need not be suppressed despite noncompliance with statutory requirements because governing statutes, 18 U.S.C. §§ 3121-3127, do not require exclusion for violations), cert. denied, 502 U.S. 1075, 112 S.Ct. 975, 117 L.Ed.2d 139 (1992)). Similarly, the SCA “allows for civil damages, see 18 U.S.C. § 2707, and criminal punishment, see 18 U.S.C. § 2701(b), but nothing more. Indeed, the Stored Communications Act also expressly rules out exclusion as a remedy; Section 2708, entitled ‘Exclusivity of Remedies,’ states specifically that § 2707's civil cause of action and § 2701(b)'s criminal penalties ‘are the only judicial remedies and sanctions for violations of’ the Stored Communications Act. 18 U.S.C. § 2708.” U.S. v. Smith, 155 F.3d 1051, 1056 (9th Cir. 1998).

We agree with the government's contention that if law enforcement's use of electronic equipment to track the target phone to Lira-Esquivel's apartment violated either the Pen/Trap Act, or the SCA, suppression of that evidence is nonetheless not an available remedy.

Although Lira-Esquivel does not specifically reference Title I of the ECPA, 18 U.S.C. § 3117, as a basis for his motion to suppress, the Court shall address it sua sponte because it provides the statutory context for law enforcement use of mobile tracking devices. Further, Defendant's contention that a warrant establishing probable cause is required for agents to utilize a mobile tracking device, arises, if at all, under ECPA's Title I. We move therefore to determine whether Title I authorizes law enforcement officers to utilize cell site tracking information to locate a cellular phone without having secured a search warrant under Rule 41, to do so and whether, when a valid warrant allowing receipt of cellular site information relating to the Target Phone had been issued, pursuant to § 2703 (the "SCA") as well as a valid arrest warrant for a fugitive believed to possess the target phone they supply the required cause showing. If not, we address as well whether suppression is required.

4. *Title I of the ECPA: tracking devices*

Title I of the ECPA amended the 1968 federal wiretap statute (the "Wiretap Act") to include electronic communications, providing that, before a telephone conversation can be lawfully intercepted, there must be a judicial determination of probable cause. See generally 18 U.S.C. § 2518; Texas Cell Site Case, 396 F. Supp. 2d at 751. One portion of ECPA's Title I expressly relates to mobile tracking devices. Pub. L. No. 99-508, Title I, § 108(a), 100 Stat. 1858 (Oct. 21, 1986) (codified at 18 U.S.C. § 3117). These provisions authorize a court "to issue a warrant or other order for the installation of a mobile tracking device" which may move across

district lines. 18 U.S.C. § 3117(a). The term “tracking device” is broadly defined to mean “an electronic or mechanical device which permits the tracking of the movement of a person or object.” 18 U.S.C. § 3117(b). As noted in the Texas Cell Site Case, the tracking device statute “does not distinguish between general vicinity tracking and detailed location tracking.” 396 F. Supp. 2d at 755. Instead, the statute simply defines a tracking device as “an electronic or mechanical device which permits the tracking of the movement of a person or thing.” 18 U.S.C. § 3117(b). “[C]ell-site data unquestionably permits the tracking of the movement of a cell phone when two-thirds of users can be pinpointed within 100 meters and 95 percent within 300 meters.”<sup>23</sup> Maryland Cell Site Case, 402 F. Supp. 2d at 603-04. Moreover, “the Department of Justice itself uses the term ‘tracking device’ to describe a device that acquires ‘information that will allow [a mobile telephone] properly to transmit the user's voice to the cell tower’ and thereby determine ‘the direction and signal strength (and therefore the approximate distance) of the target phone.’” New York Cell Site Case, 396 F. Supp. 2d at 310 -311; (quoting Texas Cell Site Case, 396 F. Supp. 2d at 755 n. 12, and U.S. Dep't of Justice, Electronic Surveillance Manual at 45 (rev. June 2005)).

Unlike other provisions in the ECPA, Title 18 U.S.C. § 3117 does not contain any direction to law enforcement or standards for obtaining a warrant permitting the installation of and monitoring by a tracking device.<sup>24</sup> Maryland Cell Site Case, 402 F. Supp. 2d at 604.

---

<sup>23</sup> Traditional homing devices are now monitored via radio signals using the same cell phone towers used to transmit cell site data. Maryland Cell Site Case, 402 F. Supp. 2d at 604; citing Texas Cell Site Case, 396 F. Supp. 2d at 754-55.

<sup>24</sup> Title 18 U.S.C. § 3117(a) provides:

(continued...)

Because the ECPA was not intended to affect the legal standard for the issuance of orders authorizing these devices, see 752 H.R. Rep. 99-647, at 60 (1986), a Rule 41 probable cause showing and procedures were (and still are) the standard procedure to authorize the installation and use of mobile tracking devices. See United States v. Karo, 468 U.S. 705, 720, 104 S.Ct. 3296, 82 L.Ed.2d 530 n. 6 (1984) (holding that warrantless monitoring of beeper in private residence violates Fourth Amendment); see also Texas Cell Site Case, 396 F. Supp. 2d at 752. Like other Rule 41 warrants, the only limit on authorizing and conducting such searches (or in this case, electronic devices) is the Fourth Amendment.<sup>25</sup> See Maryland Cell Site Case, 402 F. Supp. 2d at 604. In other words, only if a Fourth Amendment privacy interest exists which would be violated by the government's mobile tracking of a cell phone, is a warrant necessary for the search.

Our research has revealed no binding precedent in this circuit on the issue of whether a warrant based on probable cause is needed before the government can use cell site information to track a cell phone's location. Similarly, we have found no controlling case law on the more

---

<sup>24</sup>(...continued)

If a court is empowered to issue a warrant or other order for the installation of a mobile tracking device, such order may authorize the use of that device within the jurisdiction of the court, and outside that jurisdiction if the device is installed in that jurisdiction.

<sup>25</sup> The warrantless monitoring of a tracking device located in a public place generally does not implicate the Fourth Amendment. See United States v. Knotts, 460 U.S. 276, 285 (1983) (warrantless monitoring of an electronic tracking device inside a container of chemicals did not violate the Fourth Amendment when it revealed no information that could not have been obtained through visual surveillance); Karo, 468 U.S. at 721 (there is no reasonable expectation of privacy when a tracking device is monitored as it travels through a public place); see also Maryland Cell Site Case, 402 F. Supp. 2d at 604.

specific issue of whether a defendant has a remedy, through a motion to suppress, when the government has used cell site information to track a cellular phone without first obtaining a warrant under Federal Rule of Criminal Procedure 41. The cases which discuss the issue – of cell phone tracking and the necessity of a warrant – are not only not binding on this court, they are procedurally distinguishable in that the issue arose there when the government requested receipt of cell site information in a warrant application rather than when a motion to suppress after a warrant has been issued – based, not on probable cause, but on less exacting standard of “specific and articulable facts” – and cell phone tracking technology has been used utilized.

Conceding that no warrant was obtained to authorize the acquisition of cell phone site location evidence, the government maintains that no warrant was required to locate Sosa-Verdeja’s cell phone but, if it was, then the arrest warrant for Sosa-Verdeja satisfied that requirement, because an arrest warrant gives law enforcement authority to physically enter a target’s home to search for the target; see Payton v. New York, 445 U.S. 573, 603 (1980); United States v. Pallais, 921 F.2d 684, 690 (7th Cir. 1991). The arrest warrant also provides authority to use lesser intrusive means to search for the person sought. For example, if the use of cell location information invades a private space, that intrusion is less than the intrusion resulting from a physical search, which is also permissible. Thus, the argument goes, an arrest warrant implicitly authorizes officers to locate the target of the arrest warrant by using cell phone location information, even if doing so invades the privacy of the target’s dwelling.<sup>26</sup>

We agree that any warrant requirement by Title I and Rule 41 applicable to a Title I

---

<sup>26</sup> Evidence at the hearing established that Sosa-Verdaja leased the apartment, paid the rent for the apartment, and, although he was not in the apartment on May 9, 2005, he had clearly been in the apartment. Gov’n’t Combined Supp. Resp. at 6.

search by way of a tracking device was satisfied by Sosa-Verdeja's Arrest Warrant issued on May 23, 2005. The Arrest Warrant gave law enforcement the authority to physically enter a target's home in order to search for the target; see Payton v. New York, 445 U.S. 573, 603 (1980); United States v. Pallais, 921 F.2d 684, 690 (7th Cir. 1991), and also gave law enforcement the authority to conduct a less intrusive search for the fugitive by tracking cell location information in an effort to locate him, even if it invaded the apartment he rented.

Alternatively, if the arrest warrant didn't suffice to authorize the use of a tracking device, the evidence gathered would nonetheless withstand suppression because no exclusionary rule applies to the seizure of such evidence. Title 18 U.S.C. § 2512 sets out a generic statutory exclusionary rule, as follows:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Significantly, this statutory exclusionary rule applies only to wire or oral communications that violate the statutory procedures; it does not apply explicitly to electronic communications. See 18 U.S.C. 2515. Thus, suppression is not available as a remedy under Title I because there is no statutory authorization provision for such a remedy or under § 2512, the generic statutory suppression statute, because the language of that statute does not encompass electronic communications, only wire or oral communications.

Therefore, having determined that no statutory basis exists for suppression of the evidence, we move on to the Fourth Amendment analysis, and as we explain fully in Section I.B

supra, Lira-Esquivel cannot establish a Fourth Amendment privacy interest which was violated by the government's tracking of the target cell phone. Assuming the Arrest Warrant did not provide probable cause and conceding that no other warrant under Rule 41 was obtained, there remains no basis on which to exclude the evidence collected by law enforcement on May 9, 2005 at Lira-Esquivel's home.

**B. Alleged Fourth Amendment Violation: Lira-Esquivel Lacks Standing to Challenge the Government's Tracking of Another Person's Cellular Phone and the Warrant that Tracking was based upon.**

"In every federal case, the party bringing the suit must establish standing to prosecute the action. 'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, \*11, (2004) (quoting Warth v. Seldin, 422 U.S. 490, 498, (1975)). Prudential standing encompasses, *inter alia*, "the general prohibition on a litigant's raising another person's legal rights. . . ." Newdow, 542 U.S. at \*12 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). The Court explains:

"There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated-the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."

Newdow, 542 U.S. at \*15 (quoting Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 80, (1978)). In a Fourth Amendment context, "[a] defendant cannot assert a privacy interest on behalf of someone else. Indeed, a defendant charged with a crime of possession can only claim the benefits of the exclusionary rule if his or her own Fourth Amendment rights have been violated." United States v. Mendoza, 438 F.3d 792, 795 (7th Cir.

2006); See also U.S. v. Shaw, 88 Fed. Appx. 102, \*4 (7th Cir. 2004) (holding that defendant had no standing to assert a violation of his girlfriend's Fourth Amendment rights when police officers searched the car she was driving which resulted in the discovery of a gun with defendant's fingerprints on it).

Lira-Esquivel contends that because the tracking conducted here intruded into his private dwelling, as opposed to a public place, it was an unconstitutional search under the Fourth Amendment. Def.s' Supp. at 5 (citing Kyllo v. United States, 533 U.S. 27 (2001)). The government responds that Lira-Esquivel lacks standing to challenge the admissibility of evidence obtained through a violation of someone else's constitutional rights and that Lira-Esquivel's privacy interests in his dwelling were not violated because the target cell phone signals that permitted law enforcement to locate the specific phone that had been tied to Sosa-Verdeja were detectable outside of Lira-Esquivel's apartment. See Minnesota v. Carter, 525 U.S. 83, 91 (1998); Gov. Combined Resp. at 2.

Lira-Esquivel maintains that the Constitutional violation arose not because he had a protectible interest in the target phone, but from the fact that the U.S. Marshal used a device that was able to provide the agents with information they otherwise could not have gained without physically entering Lira-Esquivel's apartment. Relying on the holding in Kyllo v. United States, 533 U.S. 27 (2001), Lira-Esquivel notes that the Supreme Court concluded that law enforcement's use of a heat-sensing device on the exterior of a residence to obtain evidence they would not have been able to obtain without the equipment was a search under the Fourth Amendment. Specifically, the Kyllo Court held that evidence obtained through the search of the interior of a residence with technology that is not available to the public violates the Fourth

Amendment expectation of privacy and constitutes an unlawful search. Id. at 34-35.

The government argues that its use of the cell location information did not intrude upon Lira-Esquivel's expectation of privacy in his residence, because law enforcement merely monitored the radio signals emitted by Sosa-Verdaja's phone which signals were detectable outside Lira-Esquivel's apartment. Gov't Combined Resp. at 4; citing Katz v. United States, 389 U.S. 347, 351 (1967). In Katz, the Supreme Court stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected." Id. at 351 (internal citations omitted); but see United States v. Forest, 355 F.3d 942, 951-52 (6th Cir.2004) (finding that, unlike dialed telephone numbers, cell site data is not "voluntarily conveyed" by the user to the phone company, but is transmitted automatically during the registration process entirely independent of the user's input, control, or knowledge.)

We view the case at bar as distinguishable from Kyllo, because, in Kyllo, law enforcement targeted the home to gain information relating to activities underway inside. Here, law enforcement officers targeted a particular phone only as to its location, which, it turned out, was determined to be at 5352 Deming. The Deputy U.S. Marshal did not obtain any information regarding Lira-Esquivel's home, beyond the fact that the target phone was present in one of the three apartment units at 5352 Deming;<sup>27</sup> the specific apartment was occupied by Lira-Esquivel,

---

<sup>27</sup> In United States v. Karo, 468 U.S. 705 (1984), agents briefly monitored a beeper to determine which warehouse it was in. The Court held this did not violate the Fourth Amendment, because "the beeper informed the agents only that the ether [to which it was attached] was somewhere in the warehouse; it did not identify the specific locker in  
(continued...)

as it turned out. Upon entering the premises, the agents became certain of the target phone's location only after SA Dooley dialed the target's phone number, heard its ring and saw it lying in their plain view. (Tr. at 23.) Further, the cell phone signals were knowingly exposed to a third-party, to wit, the cell phone company. Finally, if the possessor of the cell phone intends to keep the cell phone's location private, he could do so by simply turning off the cell phone, causing the unit to cease transmitting signals to outside parties.

The "target cell phone" which the agents were able to, and did track belonged to or was otherwise connected to Sosa-Verdeja (arguably though Verdeja-Sanchez – Sosa-Verdeja's mother and Lira-Esquivel's wife) but not directly to Lira-Esquivel, who actually was peripheral to their tracking efforts. There is no evidence that Lira-Esquivel ever himself possessed or used Sosa-Verdeja's telephone. For these reasons, Lira-Esquivel did not have a reasonable expectation of privacy in the target's cell phone's transmissions or in Sosa-Verdeja's location. Lira-Esquivel thus cannot suppress the evidence gained from the government's tracking of Sosa-Verdeja's phone to that address. The tracking withstands Lira-Esquivel's constitutional challenge because he lacks standing to challenge it.

To summarize: What was being monitored – namely, a third person's cell phone's signal – did not implicate any protectible Fourth Amendment interest on the part of Lira-Esquivel. Though the signal originated from within Lira-Esquivel's residence, it was capable of being

---

<sup>27</sup>(...continued)  
which the ether was located. Monitoring the beeper revealed nothing about the contents of the locker that [defendants] had rented and hence was not a search of that locker." Id. at 720. In Karo, the Court explicitly left open the question of whether the government must show probable cause before monitoring a beeper in a private residence. See id. at 718 n.5.

monitored outside the home. Lira-Esquivel thus lacks a Fourth Amendment privacy interest in the signal and standing to challenge the government's tracking of the target phone. Accordingly, his motion to suppress the tracking and the locating of the cell phone based on a violation of his Fourth Amendment rights must be denied.

**C. Alleged Fourth Amendment Violation: Agents had Probable Cause to Enter Defendant Lira-Esquivel's Residence, Arrest Him, and Search His Residence.**

Lira-Esquivel maintains that it was constitutionally impermissible for law enforcement officers to enter his apartment prior to SA Dooley's call to and activation of the target cell phone. When the DEA agents arrived at Lira-Esquivel's apartment, having been led there by the cell site information they had received that caused them to believe that fugitive Sosa-Verdeja was at this location, they were acting lawfully in seeking to locate and arrest the fugitive, Sosa-Verdeja, for whom they had an arrest warrant. SA O'Reilly's knock on the door was answered by Verdeja-Sanchez and, when she was asked if Sosa-Verdeja was there or if she knew him, she answered no. SA O'Reilly next inquired of Verdeja-Sanchez whether anyone else was in the apartment, and again she said, "no," but SA O'Reilly caught a glimpse of the arm of another person and simultaneously the target cell phone on the table was activated on the table just inside the apartment. On the basis of this developing evidence, SA O'Reilly was justified in believing that Verdeja-Sanchez had lied to the agents, both about not knowing Sosa-Verdeja and about whether he was in the apartment since the man spotted further back from the entryway could have been the fugitive they were seeking to arrest based on the warrant for his apprehension. The agents' lawful purpose in being at that location, combined with Verdeja-Sanchez's false denial to federal agents that anyone else was in the apartment contrary to what the officers

observed along with the activation of the target phone (Tr. at 22-23), gave law enforcement officers more than sufficient grounds to legally enter the apartment in an attempt to execute the arrest warrant for Sosa-Verdeja. Payton v. New York, 445 U.S. 573, 603 (1980) (holding that for “Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.”); see also United States v. Pallais, 921 F.2d 684, 690 (7th Cir. 1991).

It was not Constitutionally impermissible for law enforcement officers to enter the doorway of the apartment prior to SA Dooley calling the target phone, and SA Dooley’s call, coming as it did within a few seconds of SA O’Reilly’s entry through the doorway into the apartment, gave additional justification for agents to move through the apartment to search for Sosa-Verdeja and execute the arrest warrant. (Tr. at 73.) The unfolding events made the search of the apartment for Sosa-Verdeja inevitable, and, in any event, the entry of the two DEA agents<sup>28</sup> did not lead to the discovery of any evidence or prompt SA Dooley to place the telephone call or to sweep the apartment in search of Sosa-Verdeja. Nix v. Williams, 467 U.S. 431 (1984) (addressing the inevitable discovery doctrine) and United States v. Jones, 72 F.3d 1324, 1330 (7th Cir. 1995) (same).

The government was entitled to make a protective sweep of the premises to ensure the safety of the agents in the apartment and based on SA Dooley’s investigative information,

---

<sup>28</sup> SA Dooley testified that his recall was limited to only SA O’Reilly being in the apartment before he called the target number, but SA O’Reilly testified that both he and SA Ginelli were in the apartment before SA Dooley called the target number. (Tr. 4-12-06, p.63, 4-17-06, p.76.)

corroborated by other search warrants SA Dooley had previously executed, that two indicted members of the conspiracy with whom Sosa-Verdeja had associated were known to carry firearms. (Tr. 13, 24; United States v. James, 40 F.3d 850, 863 (7th Cir. 1995) (allowing protective sweep to include search of jacket found in bathroom closet)). During the protective sweep, of the apartment, agents discovered a loaded nine millimeter handgun tucked into the cushions of the couch where Lira-Esquivel had been seated when the agents first arrived, which firearm possession was illegal under ordinances then in effect prohibiting possession inside the City of Chicago. (Tr. at 24, 159.) Agents were then justified in temporarily detaining Lira-Esquivel and Verdeja-Sanchez to verify, or to dispel their suspicions that Verdeja-Sanchez had lied to federal agents concerning the whereabouts of Sosa-Verdeja (18 U.S.C. § 1001), that Lira-Esquivel and Verdeja-Sanchez were illegally in the United States (8 U.S.C. § 1325), that Lira-Esquivel illegally possessed a firearm in the City of Chicago, and that Lira-Esquivel and Verdeja-Sanchez had knowingly assisted a federal fugitive (18 U.S.C. § 1073; Tr. at 26-27.)

After completing their protective sweep, the agents apprised Lira-Esquivel and Verdeja-Sanchez of their Miranda rights in Spanish and obtained signed consents to search the apartment from both of them. Lira-Esquivel maintains that the consent to search form he executed is ineffective as a waiver because translation of the document from Spanish to English had rendered certain key words incomprehensible. (Def. Lira-Esquivel's Exh. No. 9.) However, TFO Elias testified that he personally explained to Lira-Esquivel in Spanish their request to search the apartment, in response to which Lira-Esquivel inquired whether he had to agree to the search, evidencing his understanding of what Elias had told him. TFO Elias further advised Lira-Esquivel in Spanish that he could refuse to give his consent and law enforcement could then

seek a search warrant. (Gov't Exh. 5; Tr. at 102-103, 123-124, 127.) In addition to the reading and completion of the written form, Lira-Esquivel was verbally advised of his rights with respect to consenting to a search of the apartment and verbally consented to that search. These facts establish to the Court's satisfaction that Lira-Esquivel knowingly consented to the search of his apartment and the garage.

Lira-Esquivel's final contention is that the conduct of law enforcement officers was flagrant and on that basis alone the evidence should be suppressed since the officers committed a technical trespass when they entered into the common entrance area of the apartment building, and they unnecessarily and excessively handcuffed Lira-Esquivel and Verdeja-Sanchez as they waited in the apartment. These arguments are similarly unavailing: a tenant, such as Lira-Esquivel, has no reasonable expectation of privacy in the common areas of an apartment complex, and police do not need a warrant to enter a common area. United States v. Concepcion, 942 F.2d 1170, 1171-72 (7th Cir. 1991) ("We think the district court [is] on solid ground in holding that a tenant has no reasonable expectation of privacy in the common areas of an apartment building."). Further, putting aside the factual disagreements concerning whether Lira-Esquivel and Verdeja-Sanchez were actually handcuffed, handcuffing would have been justified after the discovery by the officers of a loaded firearm hidden in the couch cushions where Lira-Esquivel had been sitting. United States v. Brown, 79 F.3d 1499, 1509 (7th Cir. 1996) (discussing Terry stop where defendant was handcuffed because safety was at issue). We do not view the police conduct in this case to have been flagrant or otherwise warranting suppression of the evidence derived from the search. We conclude that the entry by the agents into the apartment and their initial protective sweep were constitutionally permissible, that

events occurred creating probable cause to enter further into Lira-Esquivel's apartment, to arrest him (and his wife), and that valid consents were provided by them both voluntarily and knowingly to permit law enforcement to search the apartment and garage. Therefore, Lira-Esquivel's motion to suppress evidence based on a violation of his Fourth Amendment rights is denied.

## **II. Amaral-Estrada's Motion to Suppress Evidence**

Defendant Amaral-Estrada seeks an order suppressing any and all evidence obtained as a result of his stop, detention and arrest by law enforcement on May 9, 2005, at or near the intersection of Long and Schubert, in Chicago, Illinois, and the subsequent non-consensual search of the vehicle conducted at the time of his unlawful arrest. Amaral-Estrada maintains that all the evidence which warrants suppression was recovered after it had been determined by the agents that he was not the fugitive they were seeking, and hence, his detention should have been terminated.

### **A. Alleged Fourth Amendment Violation: Agents had Probable cause to stop, question, detain, and arrest Amaral-Estrada.**

The Supreme Court has ruled that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1982). Amaral-Estrada was first detained by the agents to permit them to determine whether he was Sosa-Verdeja, the fugitive they were looking for and for whom they had an arrest warrant. See United States v. Wimbush, 337 F.3d 947, 950 (7th Cir. 2003) (concerning detention where defendant matched description of suspect and drove similar car). This was a constitutionally permissible stop about which there actually is no dispute between the parties. Amaral-Estrada contends, however, that upon determining that he, Amaral-Estrada, was not

Sosa-Verdeja, rather than release him, SA O'Reilly interrogated him about the vehicle he had been driving, and requested his identification and other information.<sup>29</sup> (See Tr. at 273; Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177 (2004), United States v. Murray, 89 F.3d. 459, 461-62 (7th Cir. 1996)). Amaral-Estrada produced proof of his Mexican citizenship, presenting a Mexican driver's license and voter registration card, but had no documentation on his person to demonstrate that he was in the United States legally. (Tr. 147-49.) That lack of documentation alone gave the agents probable cause<sup>30</sup> to arrest Amaral-Estrada for a violation of 8 U.S.C. § 1325 (improper entry by alien).

TFO Elias was contacted almost immediately by SA O'Reilly to translate SA O'Reilly's questions to Amaral-Estrada concerning his identity and his activities. Though there was evidence adduced at the hearing of radio interference and static from the two-way radio transmissions between O'Reilly and Amaral-Estrada, which made the words difficult to understand, despite whatever interruptions there may have been in their communications, the officers were left with the clear sense that Amaral-Estrada was giving them false answers to their questions (i.e., Amaral-Estrada's statement that he had no knowledge of the car that law

---

<sup>29</sup> Amaral-Estrada complains that SA Dooley, who had physically observed Sosa-Verdeja three prior times during surveillance, did not that day travel the short distance from where he was stationed to identify Amaral-Estrada as not being Sosa-Verdeja. (Def.s' Joint Supp. at 8; citing Tr. at 33-35.) However, the record reflects that SA Dooley had never previously personally observed Sosa-Verdeja (Tr. at 32-33) and that SA Dooley's identification was based on a copy of the same photograph that SA O'Reilly had been given. (Tr. at 11-12.) Utilizing a photograph of a fugitive is a common method of identification for making arrests and we will not criticize the agents' efforts in this regard. (Tr. at 140, 166.)

<sup>30</sup> Probable cause to make an arrest exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent man's belief that the suspect had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964).

enforcement had just seen him driving). Believing Amaral-Estrada's statements to be false, probable cause was created to support his arrest for a violation of 18 U.S.C. § 1001 (false statements to a federal agent).<sup>31</sup>

The government contends that Agent O'Reilly also had probable cause to arrest Amaral-Estrada for a violation of 21 U.S.C. §§ 841 and 846 (relating to controlled substances) based on O'Reilly's observations, which were informed by his prior training and experience, causing him to believe that Amaral-Estrada was participating in a "drug drop." SA O'Reilly testified that, over the course of his career, he has observed approximately twenty "drug drops." (Tr. 138.) He knew from his investigation that Sosa-Verdeja and his drug organization transported cocaine in cars. (Tr. 140-41.) He also knew Amaral-Estrada had driven the car around the block in a suspicious fashion and, upon exiting it, he and another man who had been a passenger in the vehicle continued to act suspiciously by walking back around the block and intermittently looking furtively over their shoulders. (Tr. at 145.) In response to SA O'Reilly's questions, as translated by TFO Elias, Amaral-Estrada could not explain how he had gotten to the City of Chicago (Tr. at 151), he denied driving the subject car, and further denied ever having seen or been in the Chrysler 300M. (Tr. at 153.) Later, when SA O'Reilly observed the large black duffle bag on the back seat of the Chrysler and inquired about it, Amaral-Estrada again denied any knowledge of it. (Tr. at 96.) As a trained narcotics officer, SA O'Reilly was entitled to rely on his observations, as well as his training and experience to determine whether probable cause

---

<sup>31</sup> Amaral-Estrada argues that, "assuming that he lied about his knowledge of the vehicle, the agents had no basis to detain him for obstructing their investigation as they had never informed him what it was they were investigating." Def.s' Joint Supp. at 9. However, obstruction of the criminal investigation was not the reason the government detained him, making this point by Amaral-Estrada irrelevant.

existed to believe that Amaral-Estrada had been or currently involved in a “drug drop,” concluding that probable cause existed.<sup>32</sup> See United States v. Funches, 327 F.3d 582, 586-87 (7th Cir. 2003) (reversing district court’s decision suppressing evidence that resulted from an arrest based on less than probable cause when trained narcotics officers witnessed suspicious activity consistent with drug transactions). The search of the vehicle that ensued was lawful for the additional reason that an automobile may be searched without a warrant if there is probable cause to believe that it contains evidence which the officers are entitled to seize, so long as the probable cause is based on facts that would justify the issuance of a warrant. United States v. Thornton, 197 F.3d 241, 249 (7th Cir. 1999); Maryland v. Dyson, 527 U.S. 465, 467 (1999). Here, the totality of the circumstances clearly established probable cause on which the agents could permissibly and did rely to stop, question, detain, and arrest Amaral-Estrada. Therefore, his motion to suppress the evidence seized on May 9, 2005, based on an alleged violation of his Fourth Amendment rights must be denied.

**B. Alleged Fourth Amendment Violation: Amaral-Estrada Lacks Standing to Challenge the Agents Search of the Borrowed Car.**

The government contends that, in addition to the constitutionality of Amaral-Estrada’s stop, search and arrest, he lacks standing to challenge the search of the car and the seizure of the evidence found inside. Apparently acknowledging that there is some evidence to support a conclusion by the Court that, having denied ownership or possession of the car at the time, he lacks standing to challenge the search of the vehicle and the seizure of evidence, Amaral-Estrada

---

<sup>32</sup> Amaral-Estrada argues that characterizing the events as a “drug drop” is not consistent with the evidence because agents remained in the area for more than an hour after Amaral-Estrada arrived and no one approached the car or lingered near it in a suspicious manner.

argues that, as his testimony at the evidentiary hearing made clear, he fully admits to having possessed the Chrysler 300M and therefore has standing. Def.s' Joint Supp. at 7. Amaral-Estrada was in fact observed driving the vehicle and was in possession of the keys to operate it when the agents did their Terry stop and pat down search. Amaral-Estrada admits that he had, in fact, been driving the vehicle that day and for approximately a week prior to his arrest, having received the car on loan from Sosa-Verdeja. (Tr. at 265.)

A driver who borrows a car with the owner's permission may acquire standing to challenge a search of the vehicle, but only if he has a legitimate expectation of privacy in it and/or the area searched. United States v. Jackson, 189 F.3d 502, 508 (7th Cir. 1999); see also Rawlings v. Kentucky, 448 U.S. 98, 104, (1980).

This inquiry is said to embrace two questions: (1) whether the individual, by his conduct, has exhibited a subjective expectation of privacy; and (2) whether such an expectation is justifiable in the circumstances. Several factors have been recognized as relevant in answering these questions, including: (1) whether the defendant has a possessory interest in the place searched; (2) whether he has a right to exclude others therefrom; (3) whether he has exhibited a subjective expectation that the place remain free from governmental invasion; (4) whether normal precautions were taken to protect his privacy; and (5) whether he was legitimately on the premises.

U.S. v. Duprey, 895 F.2d 303, 309 (7th Cir. 1989) (internal citations omitted).

It is clear from Amaral-Estrada's testimony as well as the agents' that, the car had been loaned to him by Sosa-Verdeja, and other individuals who would also have access to it, most significantly for purpose of receiving and transporting the duffle bag containing the currency and thereafter to permit the bag to be removed from the car by someone else. Amaral-Estrada testified that he actually did not care about the bag in the back seat because it was not his bag

and not his car. (Tr. 288-290.) The actions by the agents with respect to the car, therefore, were consistent with Amaral-Estrada's expectations, not of privacy but of unfettered access by unknown others to remove the bag. To the extent Amaral-Estrada had any expectation of privacy in the vehicle, it was greatly diminished and was therefore not violated by the agents' entry and seizure. His privacy interest was so minor that the actions taken by agents in entering the vehicle and removing and then searching the bag, thereby discovering and seizing its inculpatory contents, were not violative of any assertable Constitutional protections. Gov't Combined Resp. at 14.

For all of these reasons, we hold that the agents had probable cause to stop, question, detain, and arrest Amaral-Estrada. As for the search of the vehicle and the seizure of evidence found there, Amaral-Estrada lacks standing to challenge the constitutionality of those actions. His claim that his Fourth Amendment rights were violated lacks substance and his motion to suppress on that basis must be DENIED.

#### Conclusion

Defendant Lira-Esquivel's Motion to Quash Arrest and Suppress Evidence is DENIED and Defendant Amaral-Estrada's Motion to Suppress Evidence is likewise DENIED. IT IS SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
SARAH EVANS BARKER, JUDGE  
United States District Court  
Southern District of Indiana

Copies to:

Josh Minkler  
United States Attorney's Office  
10 West Market Street, Suite 2100  
Indianapolis, IN 46204-3048

Robert L Rascia  
61 W Superior Street  
Chicago, IL 60616

Patrick W. Blegen  
53 West Jackson Blvd., Suite 1362  
Chicago, IL 60604